No. 82-1295

In the
Supreme Court of the United States
October Term, 1982

Escambia County, Florida, et al,

Appellants,

v

Henry T. McMillan, et al,

Appellees.

On Appeal from the United States Court of Appeals for the Fifth Circuit

MOTION TO AFFIRM OR DISMISS

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March 1983

Questions Presented

1. Is the District Court's finding of purposeful racial discrimination, affirmed by the Court of Appeals, clearly erroneous?

2. If the District Court's finding of racial intent is clearly erroneous, should the judgment against Escambia County's at-large elections be affirmed nonetheless under the "results" standard established by the 1982 Voting Rights Act Amedments?

3. Where the lower courts have correctly followed the principles of Wise v Lipscomb, 437 US 535 (1978), in shaping the remedy, should this Court review the construction of Florida's constitution and statutes made by the District Court in Florida and affirmed by the Court of Appeals for the Fifth Circuit?

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Motion to Affirm or Dismiss

The Appellees move the Court to affirm the judgments below or dismiss this appeal for the reasons set out below.

I. The Fourteenth Amendment violation found by two courts below should be affirmed, under Rogers v Lodge, as not clearly erroneous.

The District Court in this case, relying on Nevett v Sides, 571 F2d 209 (5th Cir 1978), cert. denied 466 US 951 (1980), anticipated correctly the at-large vote dilution standard announced in Rogers v Lodge, __ US __, 102 SCt 3272, 73 LEd2d 1012 (1982). It found dilution of black voting strength from an "aggregate" of the facts called for by Zimmer v McKeithen, 485 F2d 1297 (5th Cir. 1973), aff'd sub nom. East Carroll Parish School Bd. v Marshall, 424 US 636 (1976), JS 89a. Then in an additional, separate analysis of the election system's 110-year legislative history, using the evidentiary criteria of Village of Arlington Heights v Metropolitan Housing Development Corp., 429 US 252 (1977), the District Court found, as a matter of fact, that the at-large scheme has been maintained with an invidious racial motive, JS 74a-75a, 92a-93a, 96a-98a. This racial intent was "bolstered by the findings under the Zimmer factors. . . ." JS 98a.

The first opinion of the Fifth Circuit panel interpreted the plurality opinion in City of Mobile v Bolden, 446 US 55 (1980), to have discredited the Zimmer analysis, JS 39a. It then reviewed the District Court's finding of

racial motivation behind the 1975 and 1977 charter proposals of the county commissioners "in addition to and apart from" the Zimmer findings, JS 39a. It reversed the District Court, which had rejected the commissioners' in-court denials of racial motives, because it found no contrary evidence in "the testimony," JS 42a. The first Court of Appeals opinion treated the District Court's "heavy reliance on Zimmer criteria as circumstantial evidence of intent to discriminate" as inconsistent with the teaching of Bolden, JS 13a, and did not consider the finding that Zimmer facts bolstered in-court testimony about racial motives in 1975 and 1977, JS 42a-43a.

After Rogers v Lodge, the Fifth Circuit panel rendered a new opinion on rehearing, in which it concluded that the District Court's joint consideration of Zimmer evidence and Arlington Heights evidence to support its finding of discriminatory intent was exactly what Rogers called for. Accordingly, it reviewed all the evidence together and affirmed the judgment, on Fourteenth Amendment grounds, as not clearly erroneous. JS 21a-22a

On appeal to this Court, the County Commissioners seek to avoid the unlikelihood of success under Rule 52's clearly erroneous standard[1] by constructing this faulty

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1. Rogers v Lodge, supra, 102 SCt at 3278, reemphasized the intensely factual nature of the inquiry into invidious purpose and the deference that should be accorded to the trier of facts, citing Pullman-Standard v Swint, __ US __, 102 SCt 1781, 72 LEd2d 66 (1982). This Court has also confirmed its reluctance, even in

syllogism: (1) if the District Court's Zimmer findings, standing alone, do not prove racial intent, and (2) if the trial judge's disbelief of the present commissioners' in-court denials, standing alone, does not prove racial intent, then (3) the combination of this evidence cannot prove racial intent, JS 21. But this is only an elaboration of the argument this Court rejected in Rogers, which held that the fact finder must consider "all the relevant facts" and must weigh them in the "aggregate" to detect discriminatory intent. Rogers, supra, 102 SCt at 3278. Rogers v Lodge has repudiated theories, like the one Appellants advance here, that "view[] each of the factors relied upon below in isolation." Bolden, supra, 446 US at 103 (J. White dissenting).[2]

The evidence supporting the finding of racial intent in this case is overwhelming, even more so than the evidence in Rogers v Lodge, in the sense that it includes proof that satisfies both Zimmer and Arlington Heights analyses. The District Court found for the black plaintiffs

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(note cont'd)
vote dilution cases like this one, "to disturb findings of fact concurred in by two lower courts." Rogers, supra 102 SCt at 3279 (citations omitted).

2. Consequently, this appeal does not present the question, as claimed by the County Commissioners, whether an at-large system can be declared unconstitutional where there is "no" evidence of invidious intent. As even the arguments in the Jurisdictional Statement demonstrate, there was abundant evidence supporting the judgment below, and the question is whether the trial court's fact findings are clearly erroneous.

on three of the four primary factors (and partly on the fourth factor) and three of the four enhancing factors under Zimmer, JS 88a-89a. Most of the factual indicia of discrimination cited by this Court in Rogers were present in the instance case as well: (1) no black candidates have ever been elected because of (2) "voting . . . severely polarized along racial lines," JS 14a, the central facts that "bear heavily on the issue of purposeful discrimination," Rogers, supra, 102 SCt at 3279; (3) past discrimination continues to be felt in the form of separate, racially segregated societies, bloc voting, and blacks' exclusion from the inner circles of government, JS 86a-87a; (4) there was past discrimination against blacks in education, JS 86a; (5) white officials have been unresponsive as shown by the appointment of only token numbers of blacks to boards and committees and by ignoring housing discrimination, JS 84a-85a; and (6) the depressed socio-economic status of Escambia County's blacks contributes to their political exclusion, JS 86a.

The District Court's Arlington Heights analysis went even further than the Rogers trial court's findings and showed a specific racial intent behind the state's choice to retain at-large county commission elections. From Reconstruction until 1901, Florida law required the governor to appoint all county commissioners "[t]o ensure that blacks were not elected in majority black counties," JS 74a. After the 1889 poll tax had disfranchised enough blacks, the state constitution was amended in 1901 to provide at-large general elections for county

commissioners, JS 74a-75a. But the white-only Democratic Party conducted its primaries for county commissioners in single-member districts. Blacks could only vote in the at-large general election, JS 75a. The resulting "anomaly" was that, for half a century, as a practical matter, county commissioners were chosen from single-member districts in elections in which only white people could vote, id. The District Court found that this sequence of historical changes in county commission selection schemes was "clearly race related" and was part of "a concerted state efforts to institutionalize white supremacy," JS 74a, 92a.[3] In 1954, after this Court had declared white primaires to be unconstitutional, the Florida state courts struck down single-member district elections in the newly opened county commission primaries, JS 75a.

Because of existing case precedent concerning "race-proof" historical periods, the District Court declined to find racial intent in the 1901 adoption of at-large general elections, JS 93a and n.8. But it considered this history as backdrop for the events in 1975 and 1977, when the incumbent commissioners rejected the recommendations of their own home rule charter committees

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3. These findings concerning the historical sequence of events, at least from the 1907 statewide primary law to the elimination of single-member district primaries in 1954, provide an alternative ground for affirming the judgmetn below. The District Court has in effect found that the maintenance of at-large general elections had a clear racial purpose during this period.

to change to district elections, 92a-98a.[4] Based on the post-trial admission of defendant's counsel and the judge's own "impression at trial," the District Court drew "the reasonable inference" that the commissioners had been motivated "by the possibility single-member districts might result in one or more of them being displaced in subsequent elections by blacks," JS 98a.

In its original opinion the Court of Appeals held that "the desire to retain one's incumbency unaccompanied by other evidence ought not to be equated with an intent to discriminate against blacks qua blacks," JS 42a-43a. However, the District Court had not grounded its finding of racial intent on the commissioners' "motive to exclude all other potential candidates," as the Court of Appeals thought, JS 20a n.19 (emphasis added), but on their motive to exclude black potential candidates specifically. On reharing, the Fifth Circuit acknowledged

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4. The Appellant County Commisioners raise the misleading contention that they cannot be held responsible for retention of the racially discriminatory at-large scheme because the county's voters rejected a referendum to change to single-member districts on November 6, 1979, JS 21-22. They criticize the judgments below on grounds that "no evidence was introduced and no findings were made" that the voters were racially motivated, JS 22. But the 1979 referendum election referred to took place sixteen months after the District Court rendered its decision against at-large elections on July 10, 1978, JS 71a. The trial court's findings were based on the refusals of the County Commissioners in 1975 and 1977 even to submit a single-member district option to the electorate, JS 96a.

Justice Stevens' admonition in Rogers that perpetuating the political dominance of an entrenched racial majority is not a legitimate justification for a dilutive election system, id., citing Rogers, supra, 102 SCt at 3287 (J. Stevens concurring). The Court of Appeals affirmed the judgment after considering "a broader range of evidence," including the Zimmer factors, JS 20a n.19, 21a.

In every respect, Rogers v Lodge commands that the decisions below be afirmed as correct under the Fourteenth Amendment. The legal analysis is correct, and there is more than ample evidence in the record to support the findings of the District Court.

II. Alternatively, the judgment below should be affirmed under the amended Voting Rights Act.

The District Court ruled that the black plaintiffs were entitled to relief under Section 2 of the Voting Rights Act of 1965, 42 USC §1973, JS 101a.[5] The Fifth

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5. The District Court had held that the at-large scheme violated the Fifteenth Amendment, JS 100a, and concluded that it necessarily violated §2 of the Voting Rights Act as well, JS 101a. The Fifteenth Amendment is also available, therefore, as a basis for affirming the judgment of the District Court. In addition, a separate Fifteenth Amendment theory advanced by plaintiffs was not mentioned at all by the Court of Appeals. It is a direct challenge to the line of precedent which holds that no racial intent may be inferred in the adoption of a facially neutral election scheme during a "race-proof" period when blacks were already disfranchised, JS 20a n.18, 93a and n.8. The proper constitutional view of "race-proof" election changes is that the exclusion of

Circuit thought plaintiff's had "presented a cogent arugment that the amended Act entitles them to relief," but it declined to address the statutory issue because of the clear Fourteenth Amendment claim and the need for a speedy remand in time for new elections, JS 3a-5a n.2. On appeal to this Court, the amended Section 2 affords an alternative ground for affirmance.

Because of this Court's decision in City of Mobile v Bolden, 446 US 55 (1980), Congress amended Section 2 of the Voting Rights Act "to make clear that proof of discriminatory intent is not required to establish a violation of Section 2" and to permit plainitffs to prove violations by showing that minority voters were denied "an equal chance to participate in the political process, i.e., by meeting the pr[e]-Bolden results test," Senate Report, No. 97-417, 97th Cong. 2d Sess., pp. 2, 16 (1982)

(note cont'd)
black voters from those legislative choices, particularly where the change was adopted by a referendum election, like Florida's 1901 constitutional election, is itself a per se violation of the Fifteenth Amendment. Bell v Southwell, 376 F2d 659 (5th Cir 1967); Hamer v Campbell, 358 F2d 215 (5th Cir 1966); Alabama v United States, 304 F2d 583 (5th Cir 1962). "[T]he sole question remaining is the sort of relief to be granted." Bell v Southwell, supra, 376 F2d at 662. Even in cases like this, where relief is being sought decades after the violation, the election plan adopted without blacks' participation should be enjoined unless the state can affirmatively demonstrate that all its discriminatory effects have been eliminated "root and branch." Green v County School Board, 391 US 430, 437-8 (1968).

(hereinafter cited as "S.R.").[6] To prevail on a claim of racial vote dilution under Section 2 of the Voting Rights Act, Congress intended that plaintiffs "show that the challenged system or practice, in the context of all the circumstances in the jurisdiction in question, results in minorities being denied equal access to the political process," S.R. at 27. "The 'results' standard . . . embodies the test laid down by the Supreme Court in White [v Regester, 412 US 755 (1973)]," S.R., p. 27.

The panel's first decision in this case was one of the reasons cited in the Senate Report for adopting a "result" test as distinguished from the more demanding "intent" test of Bolden. Congress affirmatively determined that the standard applied by the panel in this case was too high.

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6. 42 USC §1973 (1976), as amended by Pub.L. 97-205, 96 Stat. 131 (1982). This amendment took effect upon enactment, i.e., June 29, 1982, and should apply to pending litigation. See generally, Hutto v Finney, 437 US 678, 694-695 n.23 (1978); Bradley v Richmond School Board, 416 US 656 (1976); Cort v Ash, 422 US 66, 76-77 (1977); United States v Alabama, 362 US 603 (1960); United States v Schooner Peggy, 5 US (1 Cranch) 1032 (1801). Both the House and Senate Floor Managers stated that "Section 2 . . . will, of course, apply to pending cases in accordance with . . . well established principles . . ." 128 Cong. Rec. H3841 (daily ed. June 23, 1982) (remarks of Rep. Sensenbreener); 128 Cong. Rec. S.7095 (daily ed. June 17, 1982) (remarks of Sen. Kennedy).

> McMillan v Escambia County, in which plaintiffs prevailed in part was frequently cited by opponents of the "results" test. Escambia involved the at-large systems of electing county commissioners, city councilmen and school board members in Pensacola and Escambia County, Florida. The Fifth Circuit sustained the judgment for plaintiffs with respect to the School Board and city council, but not as to the at-large system of electing county commissioners. However, even a casual reading of Escambia reveals that it was one of those rare instances where the court found a "smoking gun" to satisfy the heavy burden imposed by Bolden.

S.R., pp. 37-38. Thus, Congress adopted a less onerous "result" test based upon White v Regester, supra and Zimmer. The gloss of intent that has been added in Fourteenth Amendment cases such as Washington v Davis, 426 US 229 (1976), Arlington Heights, Bolden, Rogers, and Nevett, is simply unnecessary for plaintiffs proving a case under Section 2.

The legislative history of the 1982 Voting Rights Act Amendments further makes clear that "unresponsiveness" is not an essential part of plaintiffs' case. That was a central issue argued by the Appellants in the Court of Appeals, 638 F2d 1248.

> Unresponsiveness is not a central part of plaintiff's case . . . therefore, defendants' proof of some responsiveness would not negate plaintiff's showing by other, more objective factors enumerated here that minority voters nevertheless were shut out of equal access to the political process. The amendment rejects the ruling in Lodge v Buxton, [639 F2d 1358 (5th Cir 1981)] and companion cases that unresponsiveness is a requisite element . . . .

S.R., p. 29, fn. 16.

The Senate Report also lists the types of factors which are typically relevant in proving a discriminatory result.

> 1. the extent of any history of official discrimination . . .
>
> 2. the extent to which voting . . . is racially polarized;
>
> 3. large election districts, majority vote requirements anti-single shot provisions, or other voting practices . . . that may enhance the opportunity for discriminiation . . . ;
>
> 4. a candidate slating process . . . ;
>
> 5. the extent to which members of the minority group . . . bear the effects of discrimination in such areas as education, employment and health . . . ;
>
> 6. whether political campaigns have been characterized by overt or subtle racial appeals;
>
> 7. the extent to which members of minority groups have been elected to public office in a jurisdiction.

S.R., pp. 28-29. Finding all of these factors to be present in Escambia County (except for a candidate slating process) and applying the Zimmer analysis, the District Court concluded "that the voting strength of blacks is effectively diluted under the present election system[] of the county, JS 90a, and that "black candidates are otherwise denied access to that system." JS 98a. These are the findings of fact called for by the Section 2 "results"

standard, and Appellees are entitled to relief under the statute.

III. Under the standards adopted by this Court and controlling Florida law, the District Court was correct to order its own districting plan.

The Appellants challenge the remedial order of the District Court solely on the grounds that the Courts rejected their contention that the County Commission has the authority to adopt a non-at-large plan of apportionment, JS 27.[7]

The District Court found that, because Escambia County had refused to adopt the home rule option offered by Florida law, the Escambia County Commission was bound by explicit state general laws governing the method of electing county commissioners and lacked the legislative authority to reapportion itself, JS 68a. The County Commissioners do not here contend that under ordinary circumstances they could by ordinance vary the all at-large election scheme specified for non-home rule

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7. Although the district court adopted a five single-member district plan in 1979, the timing of relief and the exact configuration of the plan are presently being reconsidered by the district court. For this reason, the appellants' appeal is premature. For aught that appears, the district court may adopt a plan which is entirely to the liking of the appellants. This appeal presently concerns only who has the power to draft and adopt the plan, rather than the plan itself.

counties by Florida law. Rather, they argue that by striking down at-large elections in Escambia County, the federal court has invested the County Commissioners with legislative authority the state constitution grants only to home rule counties. This Court should reject the Commissioners' argument and affirm the District and Circuit Courts' application of the principles of Wise v Lipscomb, 437 US 535 (1978).

The critical feature of Wise was that the City of Dallas government exercised home rule powers. The Texas Legislature had delegated to Dallas the legislative power to determine how it would elect its local government. Through its charter, Dallas had selected at-large elections. The District Court declared them unconstitutional. The charter called for a reapportionment process culminating with a referendum. But there was insufficient time for a referendum before upcoming city elections. So the Dallas City Council had to exercise the legislative power that had been delegated to the City.

> It must be noted that since there is no provision under Texas law for reapportionment of Home Rule cities such as Dallas by the state legislature, or other state agency, acceptance of respondents' position would leave Dallas utterly powerless to reapportion itself in those instances where the time remaining before the next scheduled election is too brief to permit the approval of a new plan by referendum.

437 US at 544-45 n.8 (emphasis added).

The significance of home rule is that it answers the question of who exercises the "residuum of power" when an apportionment plan is struck down. If the

Appellants' contention were upheld, it would gut the legislative authority requirement insisted on by a majority of the Justices in Wise. If Appellants' argument were accepted, it would mean that federal courts would have created in the Escambia County Commission a legislative power that otherwise would be reserved by the Florida Constitution to the legislature, except in those instances where counties adopt home rule charters.

Unlike the City of Dallas, Escambia County, having repudiated a home rule charter in a referendum election, does not have legislative power to reapportion itself. The Constitution of Florida strictly prohibits any form of election for non-home rule counties other than the at-large system. Fla. Const., Art VIII, §1(e) (1968) provides

> Except when otherwise provided by county charter, the governing body of each county shall be a board of county commissioners composed of five members serving staggered terms of four years. After each decennial census the board of county commissioners shall divide the county into districts of contigous territory as nearly equal in population as practicable. One commissioner residing in each district shall be elected by the electors of the county.

Despite the clear command of §1(e) that counties must elect their commissioners at-large, the Appellants argue that §1(f) gives Escamba County the power to adopt a plan other than the at-large plan required by the Constitution of Florida. Yet §1(f) allows county governments only to enact "county ordinances not inconsistent with general or special law." The Appellants apparently do not consider the Florida Constitution to be a general

law. The argument of Appellants is a plainly erroneous interpretation of the Florida Constitution. See also, Ervin v Richardson, 70 So2d 585 (Fla. 1954).[8]

Pursuant to the broad home rule authority set out in F.S.A. 125.60-125.88 (Supp. 1979), at least two Florida counties have chosen to elect some of their county commissioners from single-member districts. But Escambia County's voters have rejected charter government proposals twice in the last six years. Consequently, the power to change the method of electing Escambia County Commissioners remains with the state government.

The courts below have both interpreted the Florida Constitution in the same way -- contrary to the Appellants' argument. The Court should apply to this concurrent interpretation of state law the same presumption that applies to factual issues: the Supreme Court "cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error." Graver Mfg. Co. v Linde Co., 336 US 271, 275 (1949); see also, Rogers v Lodge, ___US___, 73 LEd2d 1012, 1021 (1982), City of Mobile v Bolden, 446 US 55 (1980).

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8. The state constitution does grant counties operating under home rule charters "all powers of local self-government not inconsistent with general law, or with special law approved by vote of the electors." Fla. Const., Art VIII, §1(g) (1968).

Conclusion

For the reasons set out above this court should affirm the judgments below or dismiss the appeal.

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9. Admitted as Wilson Edward Still, Jr.